CTAP CASELAW UPDATES[1] – OCTOBER 2007

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Planning, Zoning and Subdivision Law

Swan Lakers v. Board of County Commissioners of Lake County (District Court of the Twentieth Judicial District of Montana, October 9, 2007)

In rejecting a challenge to County's approval of the Kootenai Lodge Condominiums major subdivision, the Court held that the plaintiff organization lacked standing as an aggrieved party as defined in the Subdivision and Platting Act and other state statutes, and granted the developer's motion for summary judgment on plaintiff's constitutional claims.

Judge Harkin held that the express language of the Subdivision and Platting Act precludes associational or representational standing as otherwise recognized by the Montana Supreme Court and state law, and that these statutory standing requirements are constitutionally sound. Here, the "claim asserted" – an appeal under §76-3-625, MCA – statutorily identifies the specific parties that have the standing to take such an appeal, and the association's members failed to individually meet that two-part statutory criteria. "Value" within the meaning of §76-3-625(3)(b) means the price the property could command on the market, not recreational, aesthetical, personal, or other types of value.

The Court also held that the Subdivision and Platting Act does not violate the state and/or federal constitutional guarantees to a clean and healthful environment (Mont. Const. art. II, § 3), citizen participation (Mont. Const. art. II, § 8), equal protection (Mont. Const. art. II, § 4; U.S. Const. amend. XIV § 1), or preservation of historic sites (Mont. Const. art. II, § 4).

Lake County First v. Polson City Council, et al. (District Court of the Twentieth Judicial District of Montana, October 12, 2007)

Rejecting challenge to annexation, subdivision, and zone change of property from Low Density Residential to Highway Commercial to allow, in part, for the construction of a Wal-Mart Supercenter. In granting summary judgment for the City, Judge Swandal rejected the plaintiffs' claims that the re-zoning constituted illegal "spot zoning," as the property was bounded on three sides with highway commercial zones and uses, was not small, and would benefit the public generally. The court also found that the City's new growth policy, enacted days prior to the Council's decision on the application but after the Planning Board's decision, did not apply

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retroactively to Wal-Mart's application. The court noted, in *dicta*, that even if the new growth policy applied, the City could not have relied on the application's inconsistency with the growth policy to deny the application, pursuant to Section 76-1-605, MCA.

Fasbender, et al. v. Lewis and Clark County (District Court of the First Judicial District of Montana, October 23, 2007)

Granting summary judgment to County against challenge to its passage of interim zoning regulations that establish minimum lot sizes and require certain types of wastewater treatment depending on the size of the lot. In enacting interim zoning regulations, Judge Sherlock held that the promulgating agency is not required to follow the procedural requirements applicable to permanent zoning set forth in Section 76-2-205, MCA. The Court noted that subjecting interim zoning to the requirements of resolution of intention and a protest period would negate the purpose and legislative history of emergency interim zoning. The Court also rejected the plaintiffs' argument that the County's previous attempt at passing permanent zoning "substantially complied" with the publication requirements of Section 76-2-205, MCA when the County published three out of the required four notices, noting the jurisdictional consequences of violating procedural requirements.

Adult Entertainment

Tollis, Inc. v. County of San Diego (9th Circ., on appeal from the United States District Court for the Southern District of California, October 10, 2007)

Upholding a zoning ordinance governing the operation of adult entertainment businesses in unincorporated portions San Diego County. The ordinance's requirements that businesses disperse to industrial areas of the county survives intermediate scrutiny in that it serves a substantial government interest, is narrowly tailored to serve that interest, and allows for reasonable alternative avenues of communication. Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) does not require a higher standard of review or any additional showing by the government. The district court's manner of severing the ordinance's unconstitutionally long time limits was in error, as severing them and leaving the permitting requirements in place left no time limit at all.

Fantasyland Video, Inc. v. County of San Diego (9th Circ., on appeal from the United States District Court for the Southern District of California, October 15, 2007)

Upholding the same ordinance reviewed in *Tollis, Inc. v. County of San Diego* but on different grounds. The ordinance's hours-of-operation restriction survives intermediate scrutiny under the California Constitution; and the requirement of open booths at peep shows does not violate the First Amendment as it was supported by evidence of a nexus between closed booths and adverse secondary effects, and the ordinance was narrowly tailored.

Sign Regulation

Desert Outdoor Advertising, Inc. v. City of Oakland (9th Circ., on appeal from the United States District Court for the Northern District of California, October 30, 2007)

Rejecting constitutional challenge to City's sign ordinance as impermissible content-based regulation of noncommercial speech. To the extent the ordinance banned all freeway visible signs promoting the sale of a commodity not sold, produced, conducted or offered on the same lot upon which the sign was located, the ordinance did not apply to noncommercial speech. The Court also rejected the plaintiff's as-applied challenge to the ordinance, as there was no claim that the City's refusal to allow the plaintiff's freeway-visible commercial advertising was the result of any discriminatory enforcement. Finally, to the extent the ordinance banned any construction of new advertising signs entirely within the City except by variance, the ordinance provided sufficiently narrow, objective, and definite standards to guide the licensing authority and as such was not an unconsititional prior restraint: namely, requiring that the applicant show 1) that the application of the ordinance would result in practical difficulty or unnecessary hardship inconsistent with the purposes of the zoning restrictions, due to unique physical or topographic circumstances or conditions of design; 2) that the application of the ordinance would deprive the applicant of the privileges enjoyed by owners of similarly zoned property; and 3) that the grant of the variance would not constitute a grant of special privilege.

Environmental Laws

Friends of Pinto Creek, et al. v. EPA (9th Circ., on appeal from the Environmental Appeals Board, the internal appellate board of the Environmental Protection Agency, October 4, 2007)

Reversing EPA's issuance of a National Pollution Discharge Elimination System (NPDES) permit to a copper mining company in Arizona, which would have allowed mining-related discharges of copper into an Arizona waterbody already exceeding water quality standards for copper, finding permit was based on errors of law under the Clean Water Act and the National Environmental Policy Act (NEPA).

Eminent Domain

City of Bozeman v. Taylen (Montana Supreme Court, 2007 MT 256, on appeal from District Court of the Eighteenth Judicial District of Montana, October 9, 2007)

Upholding the City of Bozeman's condemnation of road right of way, made after submitting a written offer – but not executing a binding contract – to purchase the property as required by § 70-30-111(4), MCA; and rejecting the owner's belated objection to City's immediate possession of the property when the owners did not timely move to stay the District Court's order.